Public Prosecutor v Abdussamad

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO J-05–260 OF 2009
AZHAR MA'AH, SYED AHMAD HELMY AND BALIA YUSOF JJCA
12 JUNE 2012

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Criminal Procedure — Trial — Misdirection — Trial judge reduced drug trafficking charge to one of possession without giving reasons — Court earlier found prosecution had made out prima facie case of trafficking against accused — Whether trial judge misdirected herself — Whether accused's failure to explain presence of his passport together with cannabis in bag when arrested gave strong inference he knew about drugs — Whether conviction for trafficking should be made

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The respondent ('accused') was charged in the High Court with trafficking in 1,842.5g cannabis ('the first charge') and in 42,895.6g cannabis ('the second charge') contrary to s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). The prosecution's evidence was that a police party lying in ambush noticed the accused arriving at a house on a motorcycle, opening the locked iron grill door to enter the house and a short while later emerging with a sling bag ('P14') over his shoulder. After the police team moved in and arrested the accused they found inside P14 the accused's Indonesian passport and the drugs which were the subject-matter of the first charge. Using one of the three keys attached to the motorcycle's road tax disc and which were in the accused's possession, the police team entered the house where they used another one of the keys to open a locked room. Inside the room the team found more drugs, which were the subject-matter of the second charge. At the end of the prosecution's case, the trial judge found the prosecution had made out a prima facie case and called for the accused's defence on both the charges. The trial judge found the accused had not challenged the prosecution's evidence that he had physical custody of the drugs in P14 at the time he was arrested. On the second charge, the trial judge found a prima facie case had been established that the accused had custody of the drugs found in the house because the key to the locked room was with him and the evidence that he looked panic-stricken and afraid at the time of his arrest and during the searches showed his guilty knowledge of the drugs. The trial judge had accordingly invoked the presumption of trafficking against the accused under s 37(da) of the DDA. However, at the end of the defence's case the court reduced the first charge to one of possession under s 6 of the DDA and sentenced the accused to 18 years' jail and 15 strokes of the rotan. The accused was acquitted of the second charge on the ground (i) the landlord of the house was never called to testify. The investigating officer of the case had testified that the accused was not the one who had rented the house from the

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landlord (ii) the prosecution had not challenged the existence of one 'Miswar' whom the accused alleged owned the motorcycle the keys to which were attached to the keys to the house and the locked room. These factors, the trial judge held, raised a reasonable doubt that the accused had possession of the drugs found in the house. Knowledge of the drugs could also not be imputed to him because, apart from his reaction when he was arrested, there were no other facts from which inferences could be drawn that he knew about the drugs in the house. The prosecution appealed to the Court of Appeal against the High Court's decision on both charges.

Held:

(1) In her grounds of judgment the trial judge had found on the first charge that there was clear evidence the accused was carrying P14 from which the drugs were recovered. The presence of the cannabis together with the accused's passport in P14 without a plausible explanation from him gave rise to a strong inference he had knowledge of the drugs (see paras 10–11).

(2) The trial judge did not give a reason for reducing the first charge from trafficking to one of possession when the quantity of drugs in question was almost 10 times above the threshold amount provided under the law. This was an obvious misdirection on her part (see para 11).

(3) With regard to the second charge, there was no reason to disturb the finding of the trial judge based on the reasons she gave for acquitting the accused (see para 12).

[Bahasa Malaysia summary

Responden ('tertuduh') dipertuduh di Mahkamah Tinggi dengan mengedar 1,842.5g ganja ('pertuduhan pertama') dan 42,895.6g ganja ('pertuduhan kedua') bercanggahan dengan s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Keterangan pendakwaan ialah bahawa pihak polis yang menunggu dalam serang hendap mendapati bahawa tertuduh tiba di rumah dengan menunggang motosikal, membuka pintu gril besi untuk memasuki rumah dan seketika kemudian muncul dengan satu beg sandang ('P14') di atas bahunya. Selepas anggota polis memasuki dan menangkap tertuduh, mereka menemui di dalam P14 pasport Indonesia tertuduh dan dadah yang merupakan perkara subjek pertuduhan pertama. Dengan menggunakan satu daripada tiga kunci yang dilampirkan kepada cakera cukai jalan motosikal dan yang berada dalam milikan tertuduh, anggota polis memasuki rumah di mana mereka menggunakan satu daripada kunci-kunci tersebut untuk membuka bilik yang tertutup. Di dalam bilik tersebut, anggota polis menemui lebih banyak dadah, yang merupakan perkara subjek pertuduhan kedua. Pada penutup kes pendakwaan, hakim perbicaraan mendapati pendakwaan telah membuktikan kes prima facie dan memanggil untuk pembelaan tertuduh untuk kedua-dua

pertuduhan. Hakim perbicaraan mendapati tertuduh tidak mencabar keterangan pendakwaan bahawa dia mempunyai milikan fizikal dadah dalam P14 pada masa dia ditangkap. Pada pertuduhan kedua, hakim perbicaraan mendapati kes prima facie telah dibuktikan bahawa tertuduh mempunyai milikan dadah-dadah yang ditemui dalam rumah kerana kunci kepada bilik tertutup berada bersamanya dan keterangan bahawa dia kelihatan cemas dan takut pada masa penangkapannya dan semasa carian menunjukkan dia mempunyai pengetahuan bersalah mengenai dadah tersebut. Dengan ini, hakim perbicaraan menggunakan anggapan pengedaran terhadap tertuduh di bawah s 37(da) ADB. Walau bagaimanapun, pada penutup kes pembelaan, mahkamah mengurangkan pertuduhan pertama kepada milikan di bawah s 6 ADB dan menjatuhkan hukuman penjara 18 tahun dan 15 kali sebatan rotan ke atas tertuduh. Tertuduh dibebaskan daripada pertuduhan kedua atas alasan (i) tuan rumah tidak pernah dipanggil untuk memberi keterangan. Pegawai penyiasat kes tersebut memberi keterangan bahawa tertuduh bukanlah orang yang menyewa rumah daripada tuan rumah (ii) pendakwaan tidak mencabar kewujudan 'Miswar' yang didakwa oleh tertuduh memiliki motosikal dan kunci-kunci yang mana disangkutkan bersama kunci-kunci kepada rumah dan bilik yang terkunci tersebut. Hakim perbicaraan memutuskan, faktor-faktor ini menimbulkan keraguan munasabah bahawa tertuduh mempunyai milikan dadah yang ditemui dalam rumah tersebut. Pengetahuan mengenai dadah tidak boleh dikenakan kepadanya kerana, selain daripada reaksinya apabila dia ditangkap, tiada fakta lain yang boleh menunjukkan anggapan yang dia tahu mengenai dadah-dadah di dalam rumah tersebut. Pendakwaan merayu ke Mahkamah Rayuan terhadap keputusan Mahkamah Tinggi atas kedua-dua pertuduhan.

Diputuskan:

(1) Dalam alasan-alasan penghakiman beliau, hakim perbicaraan mendapati pada pertuduhan pertama terdapat keterangan jelas tertuduh membawa P14 yang daripadanya dadah-dadah tersebut ditemui. Kehadiran ganja bersama dengan pasport tertuduh dalam P14 tanpa penjelasan munasabah daripadanya menimbulkan anggapan kuat yang dia mempunyai pengetahuan mengenai dadah tersebut (lihat perenggan 10–11).

(2) Hakim perbicaraan tidak memberikan alasan untuk mengurangkan pertuduhan pertama daripada mengedar kepada milikan apabila kuantiti dadah yang dipersoalkan adalah hampir sepuluh kali melebihi tahap amaun yang diperuntukkan di bawah undang-undang. Ini jelas menunjukkan salah arah bagi pihak beliau (lihat perenggan 11).

(3) Berhubung pertuduhan kedua, tiada alasan untuk mengganggu dapatan hakim perbicaraan berdasarkan alasan-alasan yang diberikan beliau untuk membebaskan tertuduh (lihat perenggan 12).]

Notes

For cases on misdirection, see 9(2) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 5472–5482.

Legislation referred to

Criminal Procedure Code s 180
Dangerous Drugs Act 1952 ss 6, 37(da), 39B(1)(a), (2)

Appeal from: Criminal Trial No MT(5)–45–35 of 2007, (High Court, Johor Bahru)

S Selvi (Gooi & Azura) for the appellant.
Aslinda Ahad (Attorney General's Chambers) for the prosecution.

Azhar Ma'ah JCA:

[1] The respondent was charged for two offences of trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 in the High Court Johor Bahru and the said charges read as follows:

> First charge:
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> Bahawa kamu pada 10 Jun 2005, lebih kurang jam 6.00 petang di rumah Lot 10361, Jalan Mutiara 9, Taman Kemajuan, Ulu Tiram, dalam daerah Johor Bahru, di dalam Negeri Johor Darul Ta'zim telah didapati mengedar dadah berbahaya iatiu 1,842.5 gram Cannabis, dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) akta yang sama.
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> Second charge:
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> Bahawa kamu pada 10 Jun 2005, lebih kurang jam 6.00 petang di rumah Lot 10361, Jalan Mutiara 9, Taman Kemajuan, Ulu Tiram, dalam daerah Johor Bahru, di dalam Negeri Johor Darul Ta'zim telah didapati mengedar dadah berbahaya iatu 42,895.6 gram Cannabis, dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[2] The respondent was called to enter upon his defence at the close of the prosecution case in respect of both charges. At the end of the defence case the learned trial judge reduced the first charge to one under s 6 of the Act and acquitted the respondent with regard to the second charge. Not satisfied with the said orders of the trial judge the public prosecutor now appealed.

THE PROSECUTION'S CASE

[3] For originality, we lay down herein below the facts of the prosecution's case as narrated by the learned trial judge in her grounds of judgment.

(a) the salient facts are that on 10 June 2005 at about 2pm, acting on

information received, a police party led by C/Insp Juna bin Yusoff (SP4) together with Insp Arman and 17 other police officers laid an ambush at Lot 10361, Jalan Mutiara 9, Taman Kemajuan, Ulu Tiram, Johor Bahru;

(b) at about 6pm, they saw the accused arriving at the said place riding a Suzuki motorcycle bearing registration No JEK 8673. The accused then opened the gate that led to the house in the said Lot 10361 and entered the compound of the house, together with the motorcycle. The accused was then seen closing the gate, after which he opened the locked iron grilled door and was seen locking the grilled door later. About ten minutes later, the accused emerged from the house with a sling bag (P14) slung over his right shoulder and was seen once again locking the iron grilled door;

(c) the police team then sprang into action and climbed over the gate, identified themselves whereupon SP4 arrested the accused;

(d) a body search of the accused revealed nothing incriminating. A bunch of three keys together with the road tax for the motorcycle was found clutched in the accused's right hand;

(e) a search was carried out on the sling bag. Two packages wrapped in newspaper were found inside and also one Indonesian passport bearing No AH 524418 and the name Abdussamad (P17) were also found inside the sling bag;

(f) using one of the three keys recovered from the accused, SP4 then opened the lock on the iron grilled door. Inside the house, SP4 found that there were two rooms: the front room was unlocked whilst the second room was locked. Using another of the keys from the bunch of three keys, SP4 opened the second room;

(g) inside the second room, SP4 found 46 slabs of compressed dried material wrapped in aluminium foil and plastic and a weighing scale branded NHON NOA on the floor; and

(h) the two slabs found in the sling bag and the 46 slabs found in the second room were sent to the chemistry department for analysis, whereupon it was confirmed all the slabs of compressed dried material was cannabis.

FINDING OF THE HIGH COURT

[4] On the factual matrix of the prosecution's case as mentioned above the learned trial judge made her finding as follows:

First charge:

(a) from the evidence of SP4 it is clearly established that the drugs recovered

A from the sling bag which is the subject matter of the first charge was in the possession of the accused: when the accused came out of the house ten minutes after entering, he had with him the sling bag slung over his right shoulder;

(b) the defence did not challenge the evidence that the accused was arrested B while carrying the sling bag containing the two slabs of cannabis; and

(c) therefore, I find that the prosecution had proved physical custody of the said drugs in respect of the first charge.

Second charge:

C (a) the drugs in respect of the second charge were recovered from the second room in the house. SP4's evidence was that he had unlocked the lock (branded SARI) on the door with a key from the bunch of keys that was seized from the accused. The shape, size and packaging of the 46 slabs which were found wrapped in plastic and aluminium foil were almost identical with the wrapping found on the two slabs of cannabis recovered D from the sling bag. From the evidence, I find the element of custody of the drugs proved as the 46 slabs were kept locked in the second room and the key to the lock was, according to SP4, in the custody of the accused;

(b) proof of the mental element of knowledge is more often than not a matter E of inference. From the prosecution evidence, SP4 had said that the accused was panic-stricken and fearful when he was arrested and the searches were being conducted. It was submitted that the accused's behaviour or reaction is consistent with his guilty mind; and

(c) from the evidence adduced, I am in agreement with the prosecution that F the accused had knowledge of the drugs he was carrying and the drugs in the house. Hence, there was prima facie proof of possession.

[5] On the issue of trafficking, since the chemist Norashidah bt Omar (SP5) testified that the two slabs (P28 and P29) found in the sling bag contained G 1,842.5g of cannabis and the 46 slabs (P30 (1–46)) found in the locked second room in the house contained 42,895.6g of cannabis, the learned trial judge invoked the presumption of trafficking under s 37(da) of the Act. The learned trial judge added that there was irresistible inference that the respondent was trafficking in the said dangerous drugs. In view of the foregoing she 'was H satisfied that a prima facie case under s 180 of the Criminal Procedure Code had been made out and the accused was called to enter upon his defence on both charges'.

THE DEFENCE

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[6] The learned trial judge in her grounds of judgment summarised the appellant's defence as follows:

(a) the accused gave sworn evidence in his defence. He testified that on the

day he was arrested, he had arrived in Malaysia just six days earlier. He was staying in the said house which was rented by one Miswar, a fellow Achenese who, on that day had instructed him to take a bag hanging behind the front door to send it to him (Miswar). The bag was the sling bag (P14) that the accused, at the time of his arrest, was carrying over his right shoulder.;

(b) the accused denied any knowledge of the contents of the bag (P14) and also denied that his passport was kept inside the bag. He said he only realised the bag contained two slabs of cannabis when the police searched the bag and opened the packages;

(c) the accused also said that he did not have in his possession the key to the second room. It was his testimony that it was actually hanging on the wall of the living room covered over by a calendar and it was subsequent to a police search of the house for the room key that the key was found, after the calendar had fallen off from where it was hanging on the wall;

(d) the accused also testified that during the six days he was staying at the house, he did not have the keys to the house which was held by Miswar. The accused also relied on his cautioned statement (D34) which was exculpatory in nature and laid ownership of the drugs on Miswar; and

(e) the crux of the defence was essentially one of denial of knowledge of the drugs and that the drugs found in the house and sling bag belonged to his friend Miswar.

[7] Based on the above, the learned trial judge rather surprisingly reviewed the earlier position that she had taken that the prosecution had proved a prima facie case against the appellant in respect of both charges. She stated her reasons in adopting the stance as follows:

(a) firstly, the landlord of the house was never called. The IO SPG had testified that the tenant of the house was one Mustajab bin Omar. A check with the National Registration Department revealed that it was a false name. All this was mere hearsay evidence from the IO because as stated earlier, the landlord was not called and no documentary evidence was tendered at all with regard to the existence of 'Mustajab bin Omar';

(b) furthermore, SP6 had confirmed that the accused was not the tenant of the house as the landlord had apparently denied that the accused was the one who had rented the said premises when shown the accused's photograph. Bearing in mind that the accused had entered Malaysia just six days earlier, it is highly unlikely that he had rented the premises; and

(c) neither did he own the motorcycle. The key which SP4 said opened the locked door to the second room was attached to the bunch of keys together with the motorcycle key and road tax disc of the motorcycle. The accused had said the motorcycle belonged to Miswar.

The existence of Miswar has not been challenged by the prosecution.

> I find that taking all these into consideration, the accused has raised a reasonable doubt that he had possession of the drugs found in the house. Neither could knowledge be imputed to the accused because apart from his reaction when he was arrested, there is no other inference that can be drawn that the accused had knowledge of the drugs.

[8] Accordingly, the appellant was acquitted and discharged of the second charge. As for the first charge, according to her there was a clear evidence that the appellant was carrying the sling bag from which the incriminating drugs were recovered. In the circumstances, she reduced the charge to one of mere possession under s 6 of the Act and sentenced the appellant to 18 years imprisonment and 15 strokes of the rattan.

THE APPEAL

[9] The learned deputy public prosedutor before us submitted that the learned trial judge had earlier on at the close of the prosecution case made a positive finding of direct possession of the drugs in question and consequently concluded that a prima facie case against the appellant had been made out following the invocation of s 37(da) of the Act, by reason of the fact that the amount of drugs found inside the sling bag was in a very big quantity well above the threshold weight. In the circumstances, it is now wrong for the trial judge to have the first charge reduced to one under s 6 of the Act when there is no finding that the appellant has cast a reasonable doubt on the prosecution's case.

[10] On our part it is noted that the learned trial judge at para 39 of her grounds of judgment had these to say:

> As for the first charge, there was clear evidence that the accused was carrying the sling bag from which incriminating drugs were recovered. The charge in respect of the first charge was reduced to one of mere possession under s 6 of the Act …

[11] With respect, the judge has blown the issue hot and cold. The presence of the two slabs of cannabis found in the sling bag together with the respondent's passport without a plausible explanation from the respondent could give rise to strong inference that he had knowledge that the packages contained drugs. Clearly the learned trial judge did not give her explanation and reason for reducing the first charge from trafficking to one of possession when the quantity of the drugs in question is almost ten times over its threshold amount as provided for under the law. Obviously, this is a misdirection on the part of the trial judge. In the circumstances, we have no choice but to allow the appeal and substitute the conviction recorded by the trial judge to one under s 39B(2) of the Act and sentenced the respondent accordingly to the mandated

sentence of death by hanging.

THE SECOND CHARGE

[12] With regard to the second charge, we have no reason to disturb the finding of the trial judge who recorded the reasons for the acquittal of the respondent as follows:

> (ii) Furthermore, SP6 had confirmed that the accused was not the tenant of the house as the landlord had apparently denied that the accused was the one who rented the said premises when shown the accused's photograph. Bearing in mind that the accused had entered Malaysia just six days earlier, it is highly unlikely that he had rented the premises.
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> (iii) Neither did he own the motorcycle. The key which SP4 said opened the locked door to the second room was attached to the bunch of keys together with the motorcycle key and road tax disc of the motorcycle. The accused had said that the motorcycle belonged to Miswar. The existence of Miswar had not been challenged by the prosecution.

[13] We agree with the above analysis made by the trial judge and therefore we dismissed the appeal and affirmed the order of acquittal in respect of the second charge.

Order accordingly.

Reported by Ashok Kumar